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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

REPLY COMMENTS OF CELLULAR SERVICE, INC.

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SUMMARY

The reply comments of Cellular Service, Inc. ("CSI") focus on six issues.

First, the comments of the other parties confirm that the Vickrey bidding method remains the one which will best serve the Commission's goals. Use of that bidding method will maximize equity among bidders and minimize the risk of collusion. If the Commission nonetheless adopts its tentative proposal to use oral bidding in most circumstances, then, in that event, CSI proposes that any sealed bids be open before rather than after the oral auctions on the licenses covered by the sealed bid.

Second, although the parties' comments generally endorse the designation of separate spectrum blocks for small business, rural telcos, and businesses owned by minorities and women, the Commission should adopt procedures to ensure equity among those bidding for those particular blocks. To that end, the Commission should allow only small businesses to bid for the designated blocks so that companies with limited resources are not forced to bid against companies (albeit owned by minorities and women) with far greater resources. However, businesses owned by minorities and women should have a preference which they can apply in the bidding for other spectrum blocks. CSI endorses other proposals which will ensure fair participation by the designated groups.

Third, CSI endorses the proposal by Telmarc Telecommunications, Inc. that an "innovator's preference" be awarded to parties whose requests for pioneer's preference had been earlier accepted by the Commission.

Fourth, CSI agrees with AT&T that the Commission should not utilize the "letter perfect" standard in processing applications; otherwise, the Commission will unnecessarily restrict the pool of bidders. However, CSI opposes the proposal of Bell Atlantic Personal Communications, Inc. to allow cellular carriers and others to bid for any PCS license -- even if they are not eligible to acquire a license -- upon certification that the bidder will, if it succeeds, bring itself into compliance with applicable rules afterwards. That proposal will create unnecessary burdens for the Commission and other bidders.

Fifth, CSI proposes that the Commission expeditiously resolve its pending rulemaking in MM Docket No. 92-51 concerning the availability of security interests in FCC licenses. At a minimum, the Commission should make it clear that a lender or other secured party can have a security interest in the proceeds of the sale of any PCS system.

Finally, CSI opposes any auction of intermediate microwave links to be used in a PCS system. There is a substantial question whether any microwave application would satisfy the statutory criteria. Even assuming arguendo that that criteria were satisfied, it would be inequitable to require a PCS licensee to be forced into another auction to acquire a necessary link to make its PCS system operational.

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Cellular Service, Inc., ("CSI") hereby files its reply comments in the above-referenced proceeding.

I. Auction Procedures

After review of the comments, it remains clear that the Vickrey bidding method -- whereby all bids are sealed and the winning bidder pays the second-highest bid -- is the one that will best serve the Commission's goals: use of a sealed mechanism is easy to administer since bidders merely have to submit a document to the Commission; use of the second-bid mechanism ensures that the license will be awarded to the party who values it most; and, perhaps most importantly, use of sealed bids ensures that all parties will have equal access to information and have little opportunity to engage in collusion. Indeed, use of the Vickrey method may eliminate the need for the Commission to devise anti-collusion rules which, as many parties point out, will be difficult to devise and probably more difficult to enforce.

Even parties in a position to marshall vast resources for bids and to otherwise benefit from oral auctions recognize the value of sealed bids. Daniel Kelley, an economist with Hatfield Associates, Inc., prepared a report for MCI Telecommunications Corporation ("MCI") that was attached to MCI's comments. In his report, Mr. Kelley observed that "[s]ealed bidding would seem to be more accessible to small companies than participating in a centralized oral auction." Mr. Kelley added that oral auctions would enable existing dominant cellular carriers to establish an implicit strategy to exclude parties who have announced or are expected to provide vigorous competition and that "[s]ealed bidding would preclude this strategy." Daniel Kelley, "Designing PCS Auction Rules To Encourage Competition" (November 10, 1993) at 16-17.

If the Commission nonetheless adheres to its tentative conclusion to use oral bidding, then, in that event, the Commission should alter the procedure governing sealed combinatorial bids. The Commission proposed to open the sealed bids after the conduct of oral auctions and then to award the licenses (subject to a possible second opportunity by oral bidders) to the sealed bidder if the sealed bid exceeds the collective prices bid at the oral auctions. Instead, the Commission should open and publicly disclose the sealed bids before oral auctions are held on the individual licenses covered by the sealed bid. That additional information will give other parties -- especially small businesses, rural telcos, and

businesses owned by women and minorities -- vital information which can be used in devising their own bidding strategy and enabling them to obtain the license through a higher bid (if they are prepared to place a higher value on the license than the sealed bidder). This latter modification will also avoid any need to provide for further bidding (especially if, as CSI and other parties propose, oral bidders are allowed to exchange information in an effort to exceed the sealed bid).

II. Rules For Small Businesses, Rural Telcos And Businesses Owned By Minorities And Women

There appears to be universal agreement to set aside frequencies for and make tax certificate available to small businesses, rural telcos and businesses owned by women and minorities.¹ However, there appears to be some division of opinion as to how those groups can be served in a way that will promote the general welfare and not be subject to abuse by larger entities who are not entitled to any preference. Four specific issues warrant comment: (1) the eligibility criteria for Blocks C

¹ The NPRM is unclear whether tax certificates would be available to SBICs and their investors as well as SSBICs and their investors. NPRM at 27, n. 64. There is no basis to grant tax certificates for one group and not the other. Small businesses are one of the groups designated in Section 309(j), and the Small Business Advisory Committee ("SBAC") found that "entry opportunities for small service providers have been constrained in existing telecommunications markets by undercapitalization, concentration of ownership, and other conditions contributing to the exclusion of businesses owned by minorities and women." NPRM at ¶80. Tax certificates would therefore be useful to all small business bidders and their investors, regardless of whether the business is owned by minorities or women.

and D (the "Set Asides"); (2) the use of preferences by the designated groups for other spectrum blocks; (3) the level of deposit required by the designated groups; and (4) the restrictions which should be placed on the designated groups' ability to sell one of the Set Asides or any other block obtained through the use of a preference.

A. Eligibility Criteria

Given the vast resources commanded by the Regional Bell Operating Companies, AT&T/McCaw, and some of the other parties who have expressed an interest in PCS licenses, it makes obvious sense to set aside certain frequency blocks to accommodate the congressional mandate that any competitive bidding mechanism result in the dissemination of licenses "among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women . . . " 47 U.S.C. §309(j)(3)(B). As the National Telecommunications and Information Administration ("NTIA") observed, that congressional goal was designed to provide "greater opportunities for participation" by groups "that are constrained from full participation in bidding because of a lack of available capital." But pursuit of that goal may not be well served if small businesses are forced to compete for the Set Asides with other businesses -- albeit owned by women or minorities -- which have access to far greater resources. For this reason, NTIA recognized that "preferences tied to status regardless of economic circumstances could pose legal problems,

depending on the applicable legal standards of judicial review." NTIA Comments (November 10, 1993) at 25, 26 (footnote omitted).

As a small business, CSI appreciates the benefits and risks reflected in NTIA's comments. Congress obviously wanted to promote competition and participation by a wide variety of parties, a goal that would be frustrated if licenses were merely awarded to the highest bidder without regard to any other factor. That basic purpose, however, is not advanced if small businesses and rural telcos -- who, by definition, have limited resources -- are forced to compete in bidding for Blocks C and D with parties with substantially greater resources. For that reason, CSI recommends that bidding for Set Asides be confined to small businesses as defined by the Small Business Administration. In other words, a business owned by minorities or women could not compete for a Set Aside unless it is a small business. That limitation will facilitate entry by all kinds of small businesses, including those owned by minorities and women.²

² In deciding whether a party is in fact a small business, the Commission should require the party to disclose all affiliate relationships (including any parent corporations) as well as all options, warrants, and future ownership interests; the Commission should attribute the resources of those affiliated companies as well as those future owners to the small business. Thus, a party could not be deemed to be a small business if a dominant cellular carrier had an option to acquire more than 20 percent of the small business at a future date. Similarly, a rural telco would not be able to apply for one of the Set Asides if it is an affiliate of a Local Exchange Company.

B. Use Of Preferences For Non-Set Asides

CSI recognizes that the public interest will be served by assuring participation by businesses owned by minorities and women regardless of their economic resources. To achieve that goal in an equitable manner, the Commission should enable a business owned by minorities or women to have a preference when bidding on spectrum outside of Blocks C and D. As an example, the Commission could award any business owned by minorities or women a 10 percent discount when bidding for licenses other than those in Blocks C and D. By way of illustration, a bid of \$90 by a minority or female-owned business would be the equivalent of a bid of \$100 from any other group; and, a bid of \$91 by that designated group would be sufficient to win the license even though a non-designated party might actually bid more.³

C. Deposits

As explained in the Position Paper of Telmarc Telecommunications, Inc. ("Telmarc"), and as the Commission can understandably appreciate, small businesses do not have ready

³ In deciding whether a business is truly owned and controlled by minorities or women, the Commission should, as CSI proposed in its comments, require that minorities or women, as the case may be, have more than 50 percent of the equity and control. As in the case of small businesses, the Commission should also require any party seeking to use this preference to disclose all options, warrants and future ownership interests and assume the exercise of those options, warrants, and future ownership interests in deciding whether the 50/50 threshold was satisfied. Cf. WWOR-TV, 6 FCC Rcd 6569, 6572 n.13 (1991) ("in comparative cases the Commission has adopted a rebuttable presumption that options will be exercised") (subsequent history omitted).

access to substantial resources to make deposits which will remain on account with the Commission for months before it is determined whether the small business will obtain a license. For that reason, CSI endorses Telmarc's proposal that the upfront payment of a small business for a BTA license be somewhere between \$50,000 and \$100,000. See Telmarc Position Paper (November 10, 1993) at 13.

D. Alienability Restrictions On Set Asides And Preferences

CSI agrees with other parties who endorse the Commission's proposal to adopt certain restrictions on the alienability of a license secured through a preference. A party should not be able to obtain a license for a Set Aside or use a preference as proposed by CSI and then be able to make a quick profit by "flipping" the license almost immediately after it is secured. That outcome would subvert the very purposes which the Set Asides and preferences are designed to serve: namely, promotion of competition and entry by previously disadvantaged groups.

To honor the congressional mandate, the Commission should prohibit the for-profit sale of any license obtained for a Set Aside or through the use of a preference until the system has been operational for one year. Such a rule would be comparable to one applied to broadcast licenses obtained on the basis of minority preferences. See 47 CFR §73.3597(a)(1). As in the broadcast area, exceptions should be allowed for situations where the license will be sold for an amount which does not exceed the licensee's prudent and legitimate expenses. See 47 CFR

§ 73.3597(c)(2). This latter exception will enable the Commission to preserve the integrity of the rule while recognizing the prospect of unforeseen circumstances (such as bankruptcy or the death of a principal) where prohibitions against sale would be adverse to the public interest.

III. Innovator's Preference

Upon review of the comments and reconsideration of its own comments, CSI believes that an "innovator's preference" should, as proposed by Telmarc, be given to those parties whose applications for a pioneer's preference were previously accepted by the Commission. Telmarc Position Paper, supra, at 12-15. Adoption of Telmarc's proposal will provide a simple and fair means to reward those parties who have expended resources to expand the technologies and services available to the public.

Application of the innovator's preference will also be consistent with the Commission's observation in the pioneer's preference proceeding that "innovators may be small entrepreneurs who find it difficult to obtain financial support for their proposals" and that it might be appropriate to discount an innovator's preference by 25 percent. Review of the Pioneer's Preference Rules, FCC 93-477 (October 21, 1993) at ¶¶ 8, 12. CSI believes that such a discount should be made available to those parties who have already expended efforts to improve services and technology and that the discount should be available in whatever bid the innovator makes.

IV. Processing Of Applications

CSI adheres to the view in its comments that the Commission should not require the submission of a "long form" application prior to the auction. Such a requirement would needlessly increase costs and complicate the administration of auctions.

Upon further review, however, CSI agrees with AT&T's proposal to abandon the "letter perfect" standard and to allow amendments to the "short form" application (or other documents) submitted with a bid before the auction. See AT&T's Comments (November 10, 1993) at 30-31. As AT&T explains, the Commission's goal should be to expand the opportunities for participation -- a goal that would be frustrated if parties could be excluded because of an inadvertent typographical error or other minor oversight.

The same cannot be said about the proposal of Bell Atlantic Personal Communications, Inc. ("Bell Atlantic") to allow all parties -- including dominant cellular carriers -- to bid "for any PCS license so long as such applicants certify upon entry into the auction process that, in the event they are awarded a PCS license they will promptly bring their systems into compliance with the Commission's PCS service rules and eligibility restrictions." Bell Atlantic Comments (November 10, 1993) at 6-7. Bell Atlantic's proposal will needlessly complicate the auction procedure.

The problems are obvious. The most likely situation -- and one which could apply to Bell Atlantic -- would be one where a

cellular carrier obtains a PCS license in the same market covered by its Cellular Geographic Service Area. The cellular carrier could, as Bell Atlantic proposes, promise to "promptly" divest its cellular license, but Bell Atlantic does not offer any definition of "promptly" -- would it be six months? one year? two years? And whatever the time period allotted, what will be the consequence of a failure to comply -- a directive that the company divest its PCS license, which could require another extended period to accomplish? Or will the Commission feel obligated to grant an extension for compliance upon a representation that the parties are close to a deal? And what anticompetitive harm will be incurred while the Commission -- and the public -- wait for divestiture to occur?

The permutations are endless. Only one point is beyond dispute: adoption of Bell Atlantic's proposal will require the Commission and other parties -- including frustrated bidders for the license -- to expend substantial resources in monitoring a company's compliance with its certification without any compensating benefit to the public. There is no need to assume that additional burden in light of the widespread interest in PCS licenses. The Commission should adhere to its proposal to award PCS licenses only to those who can immediately satisfy the Commission's eligibility criteria. The Commission need not be concerned that a strict adherence to those criteria will unduly minimize the pool of potential bidders and shortchange the public.

V. Security Interests In PCS Licenses

As the parties' comments make clear, acquisition of PCS licenses and the construction of PCS systems will involve substantial monies. For large corporations like AT&T and MCI, debt or equity financing will be readily available. The same cannot be said for smaller companies, especially the groups -- small businesses, rural telcos, and businesses owned by women and minorities -- which Congress and the Commission have designated for special treatment. For those latter parties, obtaining necessary funds may pose a substantial -- and in some cases, insurmountable -- challenge.

In this context, particular significance attaches to the Commission's policy prohibiting security interests in licenses. E.g. Radio KDAN, Inc., 13 RR2d 100, 102 (1968), aff'd sub nom., W.H. Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969). As the Commission knows, many lenders have balked at providing financing for the acquisition of broadcast stations because of that policy. The Commission therefore instituted a rulemaking in MM Docket 92-51 to determine whether any changes in its policy are warranted. Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, 7 FCC Rcd 2654 (1992). The Commission was particularly concerned about the impact of its policy on minorities, women and other newcomers to the industry:

We believe this action is particularly appropriate now, since the availability of capital has recently become a matter of increasing concern to the industry. We also believe that this action is necessary to ameliorate the

difficulties that new entrants to this industry, including, in particular, minorities and women, have experienced in obtaining adequate financial backing and in successfully breaking into broadcast ownership. Furthermore, the capital demands of the broadcast industry for all participants can only be expected to increase in the near future as new technologies, such as Digital Audio Broadcasting and Advanced Television are implemented. The availability of capital for such enterprises is likely to be a significant determinant of whether U.S. preeminence in the field of broadcasting will be preserved.

7 FCC Rcd at 2654 (footnotes omitted).

The foregoing observations have equal -- if not greater -- applicability to the development of PCS generally and for the designated groups in particular. Unlike broadcasting, PCS is a new communications technology which has not yet been tested in the marketplace. As a result, banks and other lenders are likely to be even more cautious in making funds available for PCS than for broadcasting.

Since the Commission's resolution of its rulemaking in MM Docket No. 92-51 will have an obvious impact on the availability of security interests in PCS licenses as well as broadcast licenses, the Commission should make every effort to expedite resolution of that proceeding. At a minimum, the Commission should enable banks and other lenders to take a security interest in the proceeds of the sale of any PCS license. Such a policy would preserve the public character of a PCS (as well as a broadcast) license, and, at the same time, provide a lender with the necessary assurance that any sale of the license (including one made through a bankruptcy or a receivership proceeding) will protect the lender's preferred position.

Issuance of a policy statement with the foregoing clarification will eliminate the confusion which now dominates judicial disposition of the issue. Compare In re Atlantic Business and Community Development Corp, 994 F.2d 1069 (3rd Cir. 1993) (upholding the IRS's security interest in the proceeds of the sale of a license); In re Ridgely Communications, Inc., 139 B.R. 374 (B.D. Md. 1992) (upholding a bank's security interest in the proceeds of the sale of a station) with Matter of Tak Communications, Inc., 985 F.2d 916 (7th Cir. 1993) (upholding lower courts' decisions denying lender a security interest in the proceeds of the sale of broadcast stations). Issuance of that kind of policy statement will also facilitate acquisition of financing by the designated groups and others for PCS systems.

VI. Auction of Intermediate Links

There is some division of opinion as to whether intermediate microwave links utilized for PCS service should be subjected to auction in the event the statutory criteria are satisfied.⁴

Compare Comments of the Cellular Telecommunications Industry

⁴ There is a substantial question whether those statutory criteria could ever be satisfied for intermediate microwave links. As many parties observe, and as the Commission well knows, it is extremely rare (at least under current procedures) for mutually exclusive microwave applications to be filed since the applications must first be subjected to frequency coordination. Moreover, it cannot reasonably be said that the use of an intermediate microwave link satisfies the statutory criterion that "a principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers" 47 U.S.C. §309(j)(2)(A). A PCS licensee will not receive compensation for the use of the intermediate link; rather, the intermediate link will be used by the licensee to interconnect its facilities.

Association (November 10, 1993) at 31 with Comments of American Personal Communications (November 10, 1993) at 8-10. As a small business, CSI is particularly concerned that adoption of the Commission's proposal will be particularly inimical to small businesses, rural telcos, and businesses owned by women and minorities.

If a particular microwave facility is deemed essential to a licensee's operation, that licensee should be able to obtain the license for that intermediate facility without facing the uncertainty that an auction would necessarily present. To allow otherwise would be to defeat the very purpose of having auctions for PCS licenses in the first place. It would be the height of inequity and irrationality to say, in effect, to a winning bidder for a PCS license that the very viability of its operation will depend on its ability to succeed in a subsequent auction for an essential intermediate link. It would be akin to issuing a broadcast license to a party and then advising the new broadcast licensee that it may -- or may not -- be able to obtain the necessary STL license to transmit programming from a studio to a transmitter.

If a party succeeds in obtaining a valuable PCS license -- and pays the federal government a substantial sum for the privilege -- the Commission should facilitate and not hamper that new licensee's ability to provide service. For that reason, the Commission should not allow auctions of intermediate links.

CONCLUSION

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that the Commission adopt CSI's proposals.

Respectfully submitted,

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